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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re MS Voices of Hope, Inc.

Serial No. 76478663

Sandra Silver, President of MS Voices of Hope, Inc., Pro Se.

Mitchell Front, Trademark Examining Attorney, Law Office 111
(Craig D. Taylor, Managing Attorney).

Before Seeherman, Walters and Grendel, Administrative
Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

MS Voices of Hope, Inc. has filed an application to register the mark shown below on the Principal Register for, as amended, "providing health services and health care information for people recently diagnosed with Multiple Sclerosis."¹ In response to the examining attorney's

¹ Serial No. 76478663, filed December 27, 2002, based on an allegation of a bona fide intention to use the mark in commerce. The final refusal included a refusal on the ground that the identification of services was indefinite. In its brief, applicant amended the identification of services by adopting the language suggested by the examining attorney. The examining attorney did not explicitly accept the amendment, but he also did not pursue that ground of refusal in his brief. Therefore, we consider the services amended as indicated above.

requirement, applicant amended the application to include a disclaimer of MS apart from the mark as a whole.



The Trademark Examining Attorney has issued a final refusal to register under Section 2(d) of the Trademark Act, 15 U.S.C. 1052(d), on the ground that applicant's mark so resembles the mark VOICE OF HOPE, previously registered for "telephone counseling; namely, offering advice regarding health, psychological and family counseling,"² that, if used on or in connection with applicant's goods, it would be likely to cause confusion or mistake or to deceive.

Applicant has appealed. Both applicant and the examining attorney have filed briefs, but an oral hearing was not requested. We affirm the refusal to register.

The examining attorney contends that the marks are "highly similar" because the wording VOICES OF HOPE is almost identical to the wording VOICE OF HOPE in the registered mark; that the addition of the "s" to "voice" in applicant's mark does not distinguish the marks; that MS is

² Registration No. 1784645 issued July 27, 1993, to Muscular Dystrophy Association, Inc., in International Class 42. [SECT 15, SECT 8 (6-YR), SECTION 8(10-YR), 1st RENEWAL.]

commonly used to refer to multiple sclerosis and, thus, in the context of applicant's mark, MS is highly descriptive and of little trademark significance; and that "the design element [of applicant's mark] does not obviate the similarity between the marks" (Brief, p. 5).

Regarding the respective services, the examining attorney states the following in support of his contention that the respective services are substantially similar (Brief, p. 6):

While the applicant limits the content of its services to advice about multiple sclerosis, the applicant does not limit the manner in which the services are provided. For example, the applicant's services may be provided in person or over the telephone.

. . . The registrant places no limit on the content of its services. However, the registrant only offers its services by phone.

. . .
It is reasonable to assume that the registrant's services are available to individuals recently diagnosed with multiple sclerosis, just as applicant's services are available for those individuals.

Applicant contends that its mark is distinguishable from the registered mark; that the examining attorney has "improperly dissected the mark by disregarding the design elements and separating the mark into the components MS and VOICES OF HOPE" (Brief, p. 2); that its mark consists of a dominant design that focuses attention on the term MS, which is in the center of a collection of outward-extending sunbeams; and that the term MS, although disclaimed, is also

dominant because it expressly denotes the focus of the services.

Applicant also contends that its services are wholly unrelated to those identified in the cited registration. Applicant describes the registrant's services as "limited to telephone counseling offering advice about various forms of counseling" (Brief, p. 4), while distinguishing its own services as "in-person, primary care services" (Brief, p. 5). The examining attorney disagrees with applicant's characterization of the services recited in the cited registration. The examining attorney contends that, as written, registrant's services pertain to the actual rendering of health advice, psychological advice and family counseling, all by telephone, rather than, as applicant states, telephone counseling offering advice about various forms of counseling.

Applicant argues that, because the registrant is the Muscular Dystrophy Association, it is reasonable to conclude that registrant's services are "restricted to telephone advice regarding counseling options for those with muscular dystrophy" (Id.), whereas, applicant's services are for those with multiple sclerosis. Finally, applicant argues that the consumers of the respective health-related services are highly sophisticated and will not be confused by the

contemporaneous use of the respective marks for the identified services.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. See *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). See also, *In re Majestic Distilling Company, Inc.*, 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by Section 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); *In re Dixie Restaurants Inc.*, 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); and *In re Azteca Restaurant Enterprises, Inc.*, 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein. The factors deemed pertinent in this proceeding are discussed below.

We turn, first, to a determination of whether applicant's mark and the registered mark, when viewed in their entirety, are similar in terms of appearance, sound, connotation and commercial impression. The test is not whether the marks can be distinguished when subjected to a side-by-side comparison, but rather whether the marks are

sufficiently similar in terms of their overall commercial impressions that confusion as to the source of the goods or services offered under the respective marks is likely to result. The focus is on the recollection of the average purchaser, who normally retains a general rather than a specific impression of trademarks. See *Sealed Air Corp. v. Scott Paper Co.*, 190 USPQ 106 (TTAB 1975). Furthermore, although the marks at issue must be considered in their entirety, it is well settled that one feature of a mark may be more significant than another, and it is not improper to give more weight to this dominant feature in determining the commercial impression created by the mark. See *In re National Data Corp.*, 753 F.2d 1056, 224 USPQ 749 (Fed. Cir. 1985).

First, we agree with the examining attorney that the term VOICES OF HOPE is the dominant feature in the commercial impression created by applicant's mark. This portion of applicant's mark is virtually identical to the mark in the cited registration; we do not find that applicant's addition of "s" to "voice" provides any significant difference. The term MS in applicant's mark is admittedly descriptive and disclaimed and does not appear in any larger size or different style font than the term VOICES OF HOPE. Likewise, the design feature in applicant's mark, including the term MS at the center of that design, is less

than half the size of the entire mark. Moreover, as the examining attorney has correctly stated, when both words and a design comprise the mark, then the words are normally accorded greater weight because the words are likely to make an impression upon purchasers that would be remembered by them and would be used by them to request the services. *In re Appetito Provisions Co.*, 3 USPQ2d 1553, 1554 (TTAB 1987); and *Kabushiki Kaisha Hattori Tokeiten v. Scutotto*, 228 USPQ 461, 462 (TTAB 1985). See also: *Giant Food, Inc. v. Nation's Food Service, Inc.*, 710 F.2d 1565, 218 USPQ 390 (Fed. Cir. 1983). Thus, we find that the presence of the design and the term MS in applicant's mark does not suffice to distinguish the marks. See *In re Chatham International Inc.*, 380 F.2d 1340, 71 USPQ2d 1944 (Fed. Cir. 2004); *In re El Torito Restaurants Inc.*, 9 USPQ2d 2002 (TTAB 1988); and *In re Appetito Provisions Co.*, 3 USPQ2d 1553 (TTAB 1987).

In terms of appearance, sound, connotation and overall commercial impression, we find that the similarity between the marks which results from the presence of the term VOICE[S] OF HOPE in both marks outweighs the minor points of dissimilarity between the marks, i.e., the descriptive term MS and the presence of the design element in applicant's mark.

Turning to consider the services involved in this case, of particular relevance in view of applicant's arguments herein is the well-established principle that the question of likelihood of confusion must be determined based on an analysis of the goods or services recited in applicant's application vis-à-vis the goods or services recited in the registration, rather than what the evidence shows the goods or services actually are. *Canadian Imperial Bank v. Wells Fargo Bank*, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). See also, *Octocom Systems, Inc. v. Houston Computer Services, Inc.*, 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1992); and *The Chicago Corp. v. North American Chicago Corp.*, 20 USPQ2d 1715 (TTAB 1991).

Further, it is a general rule that goods or services need not be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is enough that goods or services are related in some manner or that some circumstances surrounding their marketing are such that they would be likely to be seen by the same persons under circumstances which could give rise, because of the marks used therewith, to a mistaken belief that they originate from or are in some way associated with the same producer or that there is an association between the producers of applicant's and registrant's goods or services.

In re Melville Corp., 18 USPQ2d 1386 (TTAB 1991), and cases cited therein.

As previously stated, applicant's services are identified as "providing health services and health care information for people recently diagnosed with Multiple Sclerosis"; and registrant's services are identified as "telephone counseling; namely, offering advice regarding health, psychological and family counseling." Applicant makes much of the exact nature of registrant's services as written and asserts that we must construe the identification as offering advice about counseling options rather than as offering actual health, psychological and family counseling. However, it is unnecessary to make this distinction as part of our analysis. Applicant's health services and health care information services must be construed, as broadly written, as encompassing both actual health and psychological counseling services for persons with multiple sclerosis and counseling information and referral services for persons with multiple sclerosis. Moreover, registrant's services are not limited, as written, to a particular class of persons and must be presumed to include persons with multiple sclerosis. Thus, we conclude that applicant's and registrant's services are closely related, if not overlapping.

Finally, we note applicant's argument that the persons availing themselves of the respective services are sophisticated consumers; although, applicant has presented no evidence on this point. From the recitations of services in both the registration and application, we can only conclude that consumers would be members of the general public, including persons of varying levels of sophistication with respect to both the identified services and the trademarks used to identify those services. Furthermore, even sophisticated consumers of the identified services are not immune from confusion when the marks are as similar as these marks and the services in connection with which they are used or proposed to be used are as closely related as the services herein. *See In re General Electric Company*, 180 USPQ 542 (TTAB 1973).

Therefore, we conclude that in view of the substantial similarity in the commercial impressions of applicant's mark and registrant's mark, their contemporaneous use on the closely related and/or overlapping services involved in this case is likely to cause confusion as to the source or sponsorship of such services.

Decision: The refusal under Section 2(d) of the Act is affirmed.